

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOSEPH WOOD, SR.,)	
)	
Plaintiff,)	
)	
v.)	1:10CV509
)	
DURHAM COUNTY BOARD OF EDUCATION,)	
TIM GIBSON, (in his individual and)	
official capacity as Principal)	
Easley Elementary School),)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the unopposed Motion for Leave to File an Amended Complaint (Docket Entry 7) and the unopposed Motion for Remand to Durham County Superior Court (Docket Entry 8) both of which were filed by Plaintiff Joseph Wood, Sr.

I. BACKGROUND

On May 28, 2010, Wood filed his Complaint in the General Court of Justice Superior Court Division, Durham County, North Carolina. (Docket Entry 4 at 1.) The Complaint named the Durham County Board of Education (the "Board") and Tim Gibson (collectively with the Board "Defendants") as Defendants. (Id.) The six-count Complaint alleged the following causes of action: (1) "Defamation of Plaintiff by [the Board]" (id., ¶¶ 45-51); (2) "Defamation of Plaintiff by Tim Gibson" (id., ¶¶ 52-58); (3) "Violation of State and Federal Special Education Law Requiring Parental Notification and Meaningful Participation" (id., ¶¶ 59-62 (emphasis added)); (4) "Violation of School Improvement Plan Requiring Parental

Involvement" (id., ¶¶ 63-67); (5) "Violation of [the Board's] Policy No. 4800 et seq., and Fundamental Fairness & Due Process of Law" (id., ¶¶ 68-72 (emphasis added)); and (6) "Violation of the Americans with Disabilities Act" (id., ¶¶ 73-77 (emphasis added)).

Defendants were served with the Complaint on June 7, 2010. (Docket Entry 1 at 1.) On July 6, 2010, they filed a Notice of Removal arguing that this Court had Federal Question jurisdiction, 28 U.S.C. § 1331, over this action, because the Complaint alleged "violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the Individuals with Disabilities Education Act . . . and the Americans with Disabilities Act[.]" (Id. at 1-2).

Defendants also filed a motion to extend their time to answer or respond to the Complaint until August 12, 2010 (Docket Entry 3 at 2), and said motion was subsequently granted by the Clerk of Court (see Docket Entry for July 6, 2010).

On July 20, 2010, Wood filed his Motion for Leave to File an Amended Complaint (Docket Entry 7 at 3), and, on July 23, 2010, he filed his Motion to Remand (Docket Entry 8 at 3). On August 3, 2010, the parties filed a Stipulation that Defendants have 14 days after an adjudication on Wood's motion to answer the Complaint. (Docket Entry 9 at 2.)

II. DISCUSSION

A. Motion for Leave to File an Amended Complaint

Given the current procedural posture of the case, the Federal Rules of Civil Procedure provide that a plaintiff may "amend its

pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).¹ Said rule further directs that "[t]he court should freely give leave when justice so requires." Id. Under this standard, the Court has some discretion, "but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion." Foman v. Davis, 317 U.S. 178, 182 (1962).

Wood proposes to amend his Complaint with respect to three claims against Defendants. (Docket Entry 7, ¶ 4.) The motion seeks to remove the terms: (1) "Federal" and "IDEA" from Count III; (2) "14th Amendment" to the United States Constitution from Count V; and (3) "Americans with Disabilities Act" and "ADA" from Count VI. (Id.)² Wood has attached an "Amended Complaint" to his motion incorporating these changes. (Docket Entry 7, Ex. A.) Wood claims that, "Defendants assert that the causes of action in the original

¹ Subpart (a)(1) provides:

(1) ***Amending as a Matter of Course.***

A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

Fed. R. Civ. P. 15(a)(1). That section is inapplicable, because the motion is neither made within 21 days of serving the Complaint, nor within "21 days after service of a responsive pleading" or motion. See id.

² Wood has replaced the references to the Americans with Disabilities Act with references to North Carolina's Persons with Disabilities Act and related statutory provisions. (See Docket Entry 7, Ex. A, ¶¶ 74, 76.)

complaint primarily arise pursuant to federal law" (Id., ¶ 5.) He states that he "does not concede that the primary causes of action in the original complaint are justiciable in federal court merely because federal questions are implicated." (Id., ¶ 6.) He contends that:

In furtherance of [his] position, . . . [he] shall take a voluntary dismissal without prejudice pursuant to Rule 41(a) . . . with respect to the 14th Amendment to the United States Constitution, the Individuals with Disabilities Education Act, . . . and the American with Disabilities Act . . . claims contained in the original complaint.

(Id., ¶ 7.)

Defendants have not filed a Response to Wood's motion. (See Docket Entries from July 20, 2010 to present.) Instead, the parties have filed a Stipulation, in which the parties have stated that, "Defendants do not object to the Motion for Leave to File Amended Complaint." (Docket Entry 9, ¶ 6.) As required by Rule 15(a)(2), Wood has obtained all of the Defendants' written consent to amend his Complaint. Therefore, the Court will grant the Motion for Leave to File Amended Complaint (Docket Entry 7).³

B. Motion for Remand

In his Motion for Remand, Wood argues, among other things, that, "[i]f this Court accepts the amendments to the original complaint, there will be no pending federal questions of law to resolve since plaintiff will immediately seek to take a voluntary

³ For reasons stated in Deberry v. Davis, No. 1:08CV582, 2010 WL 1610430, at *7 n.8 (M.D.N.C. Apr. 19, 2010) (unpublished), the undersigned Magistrate Judge will enter an order, rather than a recommendation, as to said motion.

dismissal without prejudice pursuant to Rule 41(a) . . . with respect to the 14th Amendment of the United States Constitution, the Individuals with Disabilities Education Act . . . and the Americans with Disabilities Act" (Docket Entry 8, ¶ 9.)⁴ Because Wood has not filed his Amended Complaint, the Court shall defer ruling on this motion.

III. CONCLUSION

Defendants have consented to Wood's Motion for Leave to File Amended Complaint (Docket Entry 7), however, the Amended Complaint has not yet been filed.

IT IS THEREFORE ORDERED that Wood's Motion for Leave to File Amended Complaint (Docket Entry 7) is **GRANTED** and that Wood shall file his Amended Complaint substantially in the form of the attachment to said motion within 14 days of the entry of this Memorandum Opinion and Order.

IT IS FURTHER ORDERED that Wood's Motion to Remand to Durham County Superior Court (Docket Entry 8) is **DEFERRED** until the Amended Complaint has been filed.

/s/ L. Patrick Auld
L. Patrick Auld
United States Magistrate Judge

January 24, 2011

⁴ Wood also made a Request for Attorney's Fees, pursuant to 28 U.S.C. § 1447(c). (Docket Entry 10 at 7.) Section 1447(c) provides that, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Defendants have not responded to the Motion for Remand. (See Docket Entries from July 23, 2010 to present.)